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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1963

No. 1017

ROSE COURTS, INC.
Petitioner

vs.

HARRY L. HASTINGS and
MARIE S. HASTINGS
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

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INDEX

	Page
Citation To Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional Provision Involved	2
Statement	3
Reasons For Granting Writ	5
Conclusion	12
Appendix B	13
Decree of Trial Court, Case 107579	13
Judgment of the Supreme Court of Arkansas	17
Dissenting Opinion	27
Decree in case 82474	30
Decree in case 101718	33

CITATIONS

Cases:

Hansberry v. Lee, 311 U.S. 32, 61 S.C. 115, 85 L. Ed. 22

McCambs v. Wall, 66 Ark. 336, 50 S.W. 876

Pearson v. Yewdall, 95 U. S. 294, 224 L. Ed. 436

Postal-Telegraph-Cable Company v. City of Newport, 247 U.S. 464, 62 L. Ed. 1215

Russell v. Place, 94 U.S. 606, 24 L. Ed. 214

Wilson v. North Carolina, 169 U.S. 586, 42 L. Ed. 865

Wynn v. Garland, 16 Ark. 440

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Arkansas entered in the above entitled case on December 20, 1963.

CITATION TO OPINIONS BELOW

The decree of the Chancery Court of Pulaski County, Arkansas, is unreported and is printed in Appendix B hereto, infra, page 13. The judgment of the Supreme Court of the State of Arkansas, printed in Appendix B hereto, *infra*, page 17, is

reported in 237 Arkansas Reports 426, and in 373 Southwest Reporter 2nd 583. The Dissenting Opinion of the Supreme Court of Arkansas, printed in Appendix B hereto, page 27, is unreported. The order of the Supreme Court of Arkansas denying the petition for rehearing was by way of per curiam order "Petition Denied", and is unreported.

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered on December 23, 1963, R. 14, infra. Rehearing was denied on January 20, 1964, R. 29. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

QUESTION PRESENTED

Whether a party litigant has been denied due process of law under Amendment 14, Section 1, of the Constitution of the United States where a State Court wrongfully applies the rule of *res judicata*.

Whether a party litigant has been deprived of property without due process of law reserved under Amendment 14, Section 1, of the Constitution of the United States, where a State Court erroneously holds in a pending case that *res judicata* applies by reason of a previous case, which previous case did not involve the same property nor the same parties, nor parties in privity.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the 14th Amendment of the Constitution of the United States, Section 1, USCA, Amendment 14, Section 1, page 3.

". . . nor shall any State deprive any person of life, liberty, or property without due process of law; . . ."

STATEMENT

This litigation involves a boundary dispute, the outcome of which will determine the ownership to a strip of land 84 feet wide in a commercial part of the City of Little Rock, Arkansas. The Petitioner, Rose Courts, Inc., is the owner of the east part of Lot 2, Rapley Estate, and the Respondents, Harry L. Hastings et ux, and Hastings Realty Company, are the owners of the west part of Lot 1. The two lots adjoin, with a forty foot street in between, Lot 1 being to the east of Lot 2. This street has never been opened and its location is the gravamen of this suit. The east line of Lot 2 abuts the west right of way line of the unopened street and the west line of Lot 1 abuts the east right of way line of the unopened street. The origin of the difficulty lies with the filing of a plat of Rapley Estate in 1873 which plat failed to show whether its western boundary joined the Quapaw Line or the east line of Cox's Quapaw Addition (a difference of some 170 feet). If the former, then the unopened street is where Rose Courts, Inc., contends it to be, and if the latter, it is where Hastings contends it to be.

The suit (numbered 101718 in the trial court) was filed by Rose Courts, Inc., to restrain Hastings from trespassing on the east portion of Lot 2.

In defense, Hastings contended that he (Hastings) was the owner of the strip for the reason that the decrees in three previous cases (No. 82474, 90142

and 101718) were *res judicata* to the present case. (Note: The three previous cases and the case at bar were all decided by the same court, i.e. Pulaski Cancery Court). The trial court rejected Hastings' plea of *res judicata* and determined that the unopened street was where Rose Courts, Inc., contended. On appeal to the Supreme Court of Arkansas, the trial court was reversed in a four to three decision on the plea of *res judicata*, though neither of the three previous cases had, either directly or indirectly, located the position of the unopened street or fixed the boundaries between Lots 1 and 2, Rapley Estate.

In case 82474 (*McCord vs. Arkansas Real Estate Co., Inc.*) title to the *West* 156.3 *feet of Lot* 1 was quieted in the plaintiff (McCord) and the *South* boundary line of Lot 1 was established. Neither of these two points had any bearing on the location of the unopened street nor, therefore, on the issue in the present case.

Case No. 90142 (*Arkansas Real Estate vs. McCord*) may be ignored for the reason that it was dismissed on motion of plaintiff without prejudice and is not significant.

In case 101718 (*Arkansas Real Estate Co., Inc. vs. McCord*) the plaintiff (Arkansas Real Estate Company, Inc.,) claimed to be the owner of the *West* 84 *feet of Block* 1 (Arkansas Real Estate Company having previously conveyed its title to Lot 2 to Rose Courts, Inc.) McCord pleaded *res judicata* in case 101718 based on case 82474 and the trial court sustained the plea.

Petitioner has not heretofore raised the issue that an upholding of *res judicata* would be a denial of

the process for the reason that it is only the final judgment of reversal by the Supreme Court of Arkansas, which operates to deprive Petitioner of the process.

REASONS FOR GRANTING WRIT

This Court should grant certiorari for one reason, and one reason only, to give the Petitioner that which the Court below withheld, and which is a right so basic and fundamental to every concept of justice under English and American jurisprudence as to require no authority, i.e., *the right to have its day in court*.

Admittedly, the granting of certiorari in this case is not demanded by some marked public interest or concern, or the denial of which will leave unsettled some urgent and pressing conflict in decisions of lower courts on matters of great moment; yet, there would seem, at least, a public interest, or public concern for the denial, *even to one litigant*, of that which is held so dear and vital to a judicial system founded on justice, the opportunity (nothing more, nor less) to present a grievance before a Court and *to have a hearing thereon*. This is the cornerstone of civil liberty. This is the bulwark of justice. Indeed, if we believe, "that no man is free unless all men are free", then just as surely, No man has justice unless all men have justice. Therefore we contend that there *is* an urgent aspect of public concern for which this petition inveighs.

The rule of due process of law has its roots in the earliest beginnings of constitutional government and was the first and, ipso facto, the most fundamental right of the individual under the common

law. Its birth is in that most time honored of English laws, the Magna Charta:

> "No freeman's body shall be taken, nor imprisoned, *nor disseised*, nor outlawed, nor banished, nor in any ways be damaged, nor shall the King send him to prison by force, excepting by the judgment of his peers and *by the law of the land*." (See footnote to *Mary A. Pearson vs. John Yewdall*, 95 U.S. 294, 24 L. Ed. 436).

The terms "law of the land" and "due process of law" have repeatedly been held to be interchangable *Wilson vs. North Carolina*, 169 U.S. 586, 42 L. Ed. 865.

The net result of the decision of the Court below is that the Petitioner, Rose Courts, Inc., has been deprived of the most basic right of civil justice known under English and American jurisprudence, the right to its day in court. Plainly and simply, Rose Courts, Inc., has never had the opportunity of proving where the east boundary line of its property lies and thereby has been deprived a valuable piece of property without due process of law. Nor is this simply a technical deprivation. The real and practical result is that Rose Courts, Inc., has been held to be subject to *res judicata* based upon two decisions, one of which (No. 82474) involved an entirely different boundary line of Lot 1 (the South line rather than the West line of Lot 1) and which quieted title to the West 156 feet of Lot 1 without in any wise fixing the location thereof (thus involving entirely different subject matter) and in the other (No. 101718) entirely different parties, *neith-*

er of which was representative of Rose Courts, Inc., nor in privity with Rose Courts, Inc. Indeed, Rose Courts, Inc., had already acquired its ownership in Lot 2 before Case No. 101718 was ever filed. Thus, under no basis in law or fact whatsoever, the Court below has held that Rose Courts, Inc., is barred by *res judicata* by two cases, one of which had no possible connection with the subject matter and the other of which had no possible connection with Rose Courts, Inc. Wherein, therefore, is the *res judicata* so far as Petitioner is concerned?

It is the earnest assertion of Petitioner that if the Court below had considered its evidence (consisting of the testimony of five registered engineers as opposed to not one word of testimony by Respondents, Hastings) and had *then* held for the Respondents on the *merits*, Petitioner would not be here asking this Court for relief, as it would thereby have received the only thing it believes itself entitled to, *a judicial consideration of the proof of its claim*: Petitioner can accept defeat as graciously as other unsuccessful litigants, but not when, as here, it has been deprived of that very opportunity to which *all* litigants are entitled.

The rule of res judicata, though entirely sound and worthy as a principal of law, is one that *must* (unless injustice is to result) be applied within the rather carefully prescribed limits that the courts have determined. If it were otherwise, a careless and injudicious use of *res judicata* could, and would, be the cause of substantial frustration of justice among litigants. A perfunctory attitude by appellate courts of *res judicata* would compound the wrong.

Happily, this Court has zealously recognized such an eventuality and in those cases (like the case at bar) where res judicata clearly has no application this Court has granted relief. Closely parallel cases are *Hansberry v. Lee*, 311 U.S. 32, 61 S.C. 115, 85 L. Ed. 22, and *Postal-Telegraph-Cable Company v. City of Newport*, 247 U.S. 464, 62 L. Ed. 1215.

In the Hansberry case, as here, the Court granted certiorari, on facts which are indistinguishable from the case at bar. The Respondents had brought the instant suit in the Circuit Court of Cook County, Illinois, to enjoin a breach by Petitioners of an agreement restricting the use of land within a described area of Chicago (allegedly entered into by some 500 landowners) and stipulating that for a specified period no part of the land should be "sold, leased to or permitted to be occupied by any person of the colored race" and providing further that the agreement should not be effective unless signed by 95% of the owners of the frontage in the area.

The complaint alleged that 95% had signed and that Petitioners, who were negroes, acquired (with knowledge of the agreement) land in the area from an owner who had signed and was occupying the land in the area in violation of the agreement.

Petitioners asserted that 95% of the owners had not signed the agreement to which Respondents contended that the issue was *res judicata* by reason of a decree in an earlier suit (*Burke v. Kleiman* 277 Ill. App. 519). Petitioners rejoined that they were not parties and were not bound by it.

The Circuit Court found that only about 54% had signed but that the issue was *res judicata* by reason

of the earlier case and the Supreme Court of Illinois affirmed.

In granting certiorari, the Court said:

> "State courts are free to attach such descriptive labels to litigations before them as they may choose and to attribute to them such consequences as they think appropriate under the State Constitution and laws, subject only to the requirements of the Constitution of the United States. But when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of *res judicata*, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes.".

The sole basis on which the majority opinion seeks to uphold *res judicata* is founded on a remark by Mr. R. M. Traylor, President of Arkansas Real Estate Co. and of Rose Courts, Inc., made in case No. 101718 to the effect that the 84 feet (in the case a bar) is the same 84 feet as that involved in case 82474. The court said (p. 21) that this was the "extrisic evidence" referred to in the opinion of the Supreme Court of the United States in *Russell v. Place*, 94 U.S. 606, 24 L. Ed. 214, approved by the Supreme Court of Arkansas in *McCombs vs. Wall*, 66 Ark 336, 50 S.W. 876:

> " 'It is undoubtedly settled law that a judgment of a court of competent jurisdiction upon

a question directly involved in one suit is conclusive as to that question in another suit between the same parties. But to give this operation to the judgment it must appear either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered,—the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible.' "

Several observations are pertinent in answer:

In the first place, Mr. Traylor simply was *in error* in his off-hand answer. The pleadings and decree in case 101718 (printed at Appendix B, page 33, *infra*) leave no doubt that Arkansas Real Estate Co. claimed the *West* 84 *feet of Lot* 1; regardless of where such strip may be located. In the present case, Petitioner makes no claim whatever to lands in Lot 1 but *only* that the boundary between Lots 1 and 2 be determined (which, incidentally, has never been determined by any court in any case!)

Secondly, assuming it *was* the same strip, the

greatest force that could be given the statement is that it is but evidence of the existence of a fact. It was so held by the Supreme Court of Arkansas in *Wynn v. Garland*, 16 Ark 440. Yet against such evidence (as the dissenting opinion points out) is the undisputed testimony to the contrary of five competent, registered engineers whose tstimony fully agreed and was flatly contrary to Mr. Traylor's statment. Yet on *this* the court held *res judicata* applicable.

Thirdly, the authority for the very existence of the "extricsic evidence" rule (*Russell v. Place, supra*) makes it clear that the extrinsic evidence must be persuasive and certain. The essence of the rule as stated in the Russell case is that the extrinsic evidence must show that "the precise question" was raised and determined and if there *is any doubt*, the whole subject matter will be at large and open to a new contention "unless this *uncertainty* is removed by extrinsic evidence showing *the precise point* to be involved."

Finally, it is a complete answer to the contention that privity existed between Arkansas Real Estate Co. and Rose Courts, Inc., in case No. 101718 for the reason that before case 101718 was ever filed Arkansas Real Estate Co. conveyed its interst in Lot 2 to Rose Courts, Inc. Such was the issue and this court held *res judicata* inapplicable under such facts (involving a contract) in *Postal Telegraph Cable Company vs. Newport*, cited ***supra.***

Undoubtedly the strongest argument in support of Petitioners' contention that justice has been manifestly denied in this case in found in the unusually strong and forceful language of the dissenting opin-

ion, representing the view of three of the seven justices, which refers to the majority opinion as "demonstrably unjust" and a "serious miscarriage of justice". An examination of the dissenting opinion in full abundantly demonstrates the error in the opinion of the majority.

CONCLUSION

If this case is permitted to stand, not only will one litigant have suffered a substantial loss by denial of due process, but the decision will be authority for applying *res judicata* in cases where no privity exists between parties or subject matter and, perhaps, beguile the courts of Arkansas toward further error.

For the reasons stated, it is respectfully urged that this Petition be granted.

Respectfully submitted,

HENRY E. SPITZBERG,
For petitioner.

APPENDIX

IN THE CHANCERY COURT OF PULASKI COUNTY, ARKANSAS FIRST DIVISION

ROSE COURTS, INC., *Plaintiff*

No. 107579

vs.

HARRY L. HASTINGS, MARIE S. HASTINGS, and HASTINGS REALTY COMPANY

DECREE

This cause comes on for hearing, the plaintiff, Rose Courts, Inc., appearing by its president, Robert M. Traylor, and by its attorneys, Spitzberg, Bonner, Mitchell & Hays through H. Maurice Mitchell, and the defendant, Harry L. Hastings, appearing in person, the defendant, Hastings Realty Company, an Arkansas Corporation, having been made a party-defendant by stipulation in open court, appearing by its president, Harry L. Hastings, and all defendants appearing by their attorneys, House, Holmes, Butler & Jewell, through Thomas C. Trimble, Jr., Horace Jewell and Philip E. Dixon, upon the complaint of the plaintiff, the amended answer of the defendants, and the amendment to the answer of the defendants, whereupon the Court, from the pleadings filed herein, the testimony of the witnesses taken ore tenus before the bar of the Court, and all exhibits introduced into evidence, doth find that:

1. The avenue, being 40 feet in width, which is the boundary between the property owned by the plaintiff, Rose

Courts, Inc., (being Lot 2, Rapley Estate) and the property owned by the defendant, Hastings Realty Company, (being the Western most part of Lot 1, Rapley Estate) is located as shown by the survey of John P. Powers, Registered Professional Engineer, dated March 8, 1957, which was introduced into evidence by the plaintiff as Exhibit No. 2.

2. The defendants placed poles upon the property of the plaintiff.

3. The defendants have committed trespasses upon the property of the plaintiff.

IT IS THEREFORE, CONSIDERED, ORDERED AND DECREED that the boundary between the property owned by the plaintiff and the property owned by the defendant, Hastings Realty Company, being an avenue 40 feet in width, is located as shown on the above mentioned survey of John P. Powers, Registered Professional Engineer, with the East line of said avenue, as shown on said survey, being the West line of Lot 1, Rapley Estate, and the West line of said avenue, as shown on said survey, being the East line of Lot 2, Rapley Estate; that the defendants be, and they are hereby, ordered to remove the poles which they previously placed upon the property of the plaintiff; that each of the defendants is hereby restrained from committing or causing to be committed any further trespass upon the land of the plaintiff; and that the plaintiff do have and recover from the defendants, jointly and severally, all costs expended herein.

IT IS FURTHER CONSIDERED, ORDERED AND DECREED that the Clerk of this Court be, and she is hereby, instructed to file, upon this lawsuit being finally determined, a certified copy of this Decree, along with a certified copy of the above mentioned Exhibit No. 2, reduced

in size for recording purposes, with the Recorder for Pulaski County, Arkansas; and the Recorder for Pulaski County, Arkansas is hereby authorized and instructed to record said certified copy of this Decree and said certified copy of said exhibit in his office.

s MURRAY A. REED
Chancellor

November 7, 1962

APPROVED:

SPITZBERG, BONNER, MITCHELL & HAYS and
MOSES, MCCLELLAN, ARNOLD, OWEN & MCDERMOTT
Solicitors for Plaintiff

By s H. MAURICE MITCHELL
HOUSE, HOLMES, BUTLER & JEWELL
Solicitors for Defendants
By s THOMAS C. TRIMBLE, JR.

SUPREME COURT OF ARKANSAS

No. 3074

HARRY L. HASTINGS *et al.*, *Appellants*

v.

ROSE COURTS, INC., *Appellee*

Opinion Delivered December 23, 1923
Appeal from Pulaski Chancery Court, First Division

REVERSED AND REMANDED WITH DIRECTIONS

ED F. MCFADDIN, ASSOCIATE JUSTICE

This is a boundary line dispute involving property in Lots 1 and 2 of Rapley Estate in Pulaski County. Rose Courts, Inc., an Arkansas corporation, owns the east portion of Lot 2; and Harry L. Hastings and wife (1) own the west portion of Lot 1. Running north and south between Lots 1 and 2 there was and is an unopened avenue 40 feet wide, east to west, and the lots of the litigants herein abut on said unopened avenue. Rose Courts brought this suit against Hastings to have the Chancery Court establish the true location of the unopened 40-foot avenue; and also to enjoin Hastings from alleged trespass on Rose Court's

(1) The original defendants were Harry L. Hastings and wife, and in the course of the litigation they transferred their title to the Hastings Realty Company, an Arkansas corporation. We continue to refer to all of the defendants as "Hastings."

property west of the unopened avenue. Rose Courts claimed that the unopened avenue was about 84 feet east of where Hastings claimed it to be. Hastings claimed: (a) that previous litigation was *res judicata* against Rose Courts; and (b) if *res judicata* were not sustained, the unopened avenue was 84 feet west of where Rose Courts claimed it to be. Neither side claimed title in any way to the unopened avenue.

The litigation has a considerable historic background. In 1872 the Pulaski Probate Court directed the administrator of the Estate of Charles Rapley to file a plat of portions of Sections 10, 11, and 14. This plat was filed and showed said Lots numbered 1 to 8 of Rapley Estate, each lot (2) containing approximately 9 acres; and the plat showed an unopened (and unnamed) avenue 40 feet wide east to west, running north and south, and separating Lots 1, 4, 5, and 8 on the east side of the avenue from Lots 2, 3, 6 and 7 on the west side of the avenue. The plat did not show definitely whether the property line immediately west of the Rapley Estate was the Quapaw Line or the line of Cox's Quapaw Addition, which addition is 170 feet east to west and several hundred feet north and south. This failure of the plat to establish the said west line of Rapley Estate was probably the origin of the litigation herein to be mentioned. Except for the matter of *res judicata*, subsequently to be discussed in detail, the issue could be simply stated: if the west line of the Rapley Estate bordered the Quapaw Line, then the 40-foot avenue here involved should be as contended by Hastings; but if the west line of the Rapley Estate bordered Cox's Quapaw Addition

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(2) In some instances, they are referred to as "lots" and in others as "blocks"; but the interchange of these words is not a material matter in this litigation.

then the 40-foot avenue should be as contended by Rose. In other words, a strip of about 84 feet is involved in the present litigation, depending on who is right about the location of the unopened avenue.

A voluminous record was made in the Trial Court with scores of exhibits consisting of plats, surveys, court orders, deeds, and other instruments. A number of engineers and surveyors testified, and some even repudiated their own previously made plats as to location of the 40-foot avenue. Such repudiation tended to place the issue in grave doubt as to the actual location of the 40-foot strip. (3) The Trial Court denied Hastings' plea of *res judicata* and fixed the 40-foot avenue at the place urged by Rose Courts; and from that decree Hastings has appealed, urging two points:

"1. The Trial Court erred in not holding the present action barred by reason of Pulaski Chancery Cases No. 82474, No. 90142, and No. 101718, based on the law of *res judicata*.

"2. The Court erred in not locating the forty foot avenue as shown in the C. T. Brandt Survey of December 11, 1947."

We do not reach appellants' second point because we are convinced that Hasting' plea of *res judicata* should have been sustained; and we now give the situations which show the applicability of such plea. First, we give the line of title of each litigant from the various deeds, all duly recorded:

(a) Rose Courts, the present appellee, received its deed from Arkansas Courts, dated June 27, 1950; Arkansas Court received its deed from Arkansas Real Estate Company, Inc.,

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(3) On this see *Raper v. Morrow*, 222 Ark. 414, 259 S.W. 2d 499, subsequently discussed.

stated December 9, 1949; and Arkansas Real Estate Company, Inc. received its deed from Little Rock Investment Company dated April 4, 1947.

(b) Harry L. Hastings and wife received their deed from C. C. McCord, dated May 10, 1955; and C. C. McCord received his deed from the State of Arkansas, dated December 27, 1935.

Certain cases in the Pulaski Chancery Court need to be identified:

(a) Case No. 82474 was by C. C. McCord, as plaintiff, agasint Arkansas Real Estate Company, Inc., as defendant. The decree rendered in February 1949 recited that McCord's title to the west 156.3 feet of Lot 1 Rapley Estate (that would be along the unopened avenue) was quieted, and that the boundary line between Lot 1 and Lot 4 (to the south of Lot 1 Rapley Estate "is shown by Exhibit S herein, same being a plat of the survey made by C. T. Brandt December 11, 1947." It will be observed that McCord owned his portion of Lot 1 until May 1955, and that Arkansas Real Estate Company, Inc. owned its portion of Lot 2 until December 1949, and that the parties to the present litigation claim through the respective parties in said Case No. 82474.

(b) Case No. 10142 in the Pulaski Chancery Court was dismissed by voluntary non-suit and is unimportant.

(c) Case No. 101718 in the Pulaski Chancery Court was styled, Arkansas Real Estate Company, Inc., as plaintiff, v. C. C. McCord and wife, defendants, and filed January 18, 1955. In that case the Arkansas Real Estate Company, Inc. claimed ownership of the west 84 feet of Block 1, Rapley Estate (same being a portion of the Hastings property). It will be observed that Arkansas Real Estate Company, Inc. conveyed its title to Lot 2 in 1949 to Arkansas Courts, yet in 1955 Arkansas Real Estate Company, Inc. was claiming,

against McCord 84 feet from Lot 1, Rapley Estate. Against such claim in Case No. 101718, McCord pleaded that the decree in Case No. 82474 was *res judicata* against Arkansas Real Estate Company, Inc.; and by decree of July 28, 1955, McCord's plea of *res judicata* was sustained.

(d) Case No. 107579 in the Pulaski Chancery Court is the present case; and Hastings has pleaded the earlier cases as *res judicata*.

Mr. R. M. Traylor, President of Rose Courts, and also President of both of the predecessor corporations, Arkansas Courts, and Arkansas Real Estate Company, Inc., was called as a witness by Rose Courts in this case; and Mr. Traylor admitted on cross examination that the 84 feet involved in the present suit was the same 84 feet that was involved (4) in

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(4) Here is Mr. Traylor's testimony:

"Q. Mr. Traylor, you have testified in regard to a conversation had between you and Mr. Hastings subsequent or shortly after Mr. Hastings' purchase of the west part of Lot 1 or Block 1 of Rapley Estate?

"A. I did, sir.

"Q. And you testified that shortly thereafter you filed a lawsuit against Mr. Hastings?

"A. Well, I think it was after that. It was along about that same time. I don't remember how many days or weeks or months it was, but it was leading up to it after Hastings bought the property and *it came to a head about this 84 feet of ours that he is claiming.* (Emphasis supplied.)

"Q. Was not that 84 feet that you are talking about exactly the same 84 feet that is involved in this law suit here now?

"A. That 84 feet that is involved in this lawsuit?

"Q. Yes.

"A. What is the number of this lawsuit? Do you mean

Case No. 101718. It is true that on re-direct examination Mr. Traylor claimed he did not know what his attorneys had alleged in the previous cases; but Mr. Traylor's admission must stand against Rose Courts, of which he is President. Such admission by Mr. Traylor is sufficient *extrinsic evidence* to identify the land in the previous litigation with the land in the present litigation and to establish Hastings' plea of *res judicata*. It is true that Arkansas Real Estate Company, Inc. had conveyed by deed to Arkansas Courts before the decree in Case No. 101718, but nevertheless the plea of *res judicata* was successfully used in Case No. 101718, with Case No. 82474 as the support for such plea; and Traylor's admission that the land in Case No. 101718 was the same as that claimed by Rose Courts in the present case establishes that the land in the present suit is the same as the land involved in Case No. 82474. Such extrinsic evidence supports the plea of *res judicata*.

The Latin words, "*res judicata*," literally translated into English mean "a thing adjudged"; and freely translated into English mean "the matter has been decided." In *Mo. Pac. R.R. Co. v. Wilson*, 205 Ark. 658, 169 S.W. 2d 872, we quoted the language from American Jurisprudence to explain *res judicata*:

"'Briefly stated, the doctrine of *res judicata* is that an existing final judgment rendered upon the merits, with-

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the present lawsuit?

"Q. Yes, sir.

"A. What is the number of that lawsuit, not that 82474 that you had awhile ago, is it?

"MR. MITCHELL: Wait a minute.

"A. There is a spit about where this street goes and if you prevail you would come 84 feet over into our property, or 85, whatever it is."

out fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to the parties and their privies, in all other actions, in the same or any other judicial tribunal of concurrent jurisdiction.' "

In Robertson v. Evans, 180 Ark. 420, 21 S.W. 2d 610, Mr. Justice Humphreys, speaking for the Court, said:

"The test in determining a plea of *res judicata* is not alone whether the matters presented in a subsequent suit were litigated in a former suit between the same parties, but whether such matters were necessarily within the issues and might have been litigated in the former suit. *Gosnell Special School Dist. No. 6 v. Baggett*, 172 Ark. 684, 290 S.W. 577; *Cole Furniture Co. v. Jackson*, 174 Ark. 527, 295 S.W. 970; *Prewett v. Waterworks Imp. Dist. No. 1*, 176 Ark. 1166, 5 S.W. (2d) 735."

We have given the line of title of Hastings and Rose Court to show that Hastings is in privity with McCord, and Rose Court is in privity with Arkansas Real Estate Company. In *Mo. Pac. v. McGuire*, *supra*, we said:

"And in 30 Am. Jur. 957, in discussing who are privies within the rule of *res judicata*, it is stated: 'In general, it may be said that privity involves a person so identified in interest with another that he represents the same legal right. It has been declared that privity within the meaning of the doctrine of *res judicata* is privity as it exists in relation to the subject-matter of the litigation, and that the rule is to be construed strictly to mean parties claiming under the same title.' See *Meyers v. Eichenbaum*, 202 Ark. 438, 150 S.W. 2d 958, cases and authorities there cited."

In *Cook v. American Cooperage Co.*, 227 Ark. 268, 297 S.W. 2d 933, we said:

"The contention that the parties are not identical under the doctrine of *res judicata* is without merit. See *Collum v. Herren*, 176 Ark. 714, 3 S.W. 2d 993, to the effect that a grantee, under the doctrine of *res judicata*, stands in the relation of privy to the grantor."

In *Carrigan v. Carrigan*, 218 Ark. 398, 236 S.W. 2d 579, we quoted the language of the United States Supreme Court in *Russell v. Place*, 94 U.S. 606, which language had been approved by Mr. Justice Battle in McCombs v. Wall, 66 Ark. 236, 50 S.W. 876, which language is:

"'It is undoubtedly settled law that a judgment of a court of competent jurisdiction upon a question directly involved in one suit is conclusive as to that question in another suit between the same parties. But to give this operation to the judgment it must appear either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record — as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered, — the whole subject-matter of the action will be at large, and open to extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible.'"

Here, as we have previously shown, Mr. Traylor's testimony was the extrinsic evidence which clearly showed that

the 84-foot strip here in issue was the same strip in issue in Case No. 82474, and that in Case No. 101718 the plea of *res judicata* was successfully urged in favor of McCord (predecessor in title to Hastings) as to the said 84-foot strip. In *Morrow v. Roper*, 222 Ark. 414, 259 S.W. 2d 499, Mr. Justice Millwee said:

> "There is no contention by plaintiff that the 1946 judgment was obtained by fraud or collusion. The only contention is that the surveyors made a mistake in establishing the boundary line in that suit. The fact, if true, that the question of the boundary line may have been erroneously determined in the former suit does not impair the conclusiveness of a valid judgment rendered by a court of competent jurisdiction, which has not been set aside or corrected on appeal. *Tri-County Highway Improvement Dist. v. Vincennes Bridge Co.*, 170 Ark. 22, 278 S.W. 627; *Strauss v. Missouri State Life Ins. Co.*, 188 Ark. 286, 66 S.W. 2d 299; 30 Am. Jur., Judgments, §196; 50 C.J.S. Judgments, §804."

In *Timmons v. Brannan*, 225 Ark. 220, 280 S.W. 2d 393, there had been a previous case to establish the boundary line between the parties; then later Timmons attempted to show that there was a street (called Ridge Street) between the properties of Brannan and Timmons, but we held the first case to be *res judicata*, saying:

> "'The test in determining the plea of *res judicata* is not alone whether the matters presented in the subsequent suit were litigated in a former suit between the same parties, but whether such matters were necessarily within the issue and might have been litigated in the former suit.' The test is not whether the matters in the second suit were *actually* litigated in the former suit between the parties, but whether such matters were

necessarily within the issues and might have been litigated in the former suit."

Appellee cites and strongly relies on *Fawcett v. Rhyne*, 187 Ark. 940, 63 S.W. 2d 349, and *McCombs v. Wall*, 66 Ark. 336, 50 S.W. 876; but neither of these cases is ruling in the case at bar. In *Fawcett v. Rhyne* we held that the adjudication concerning one parcel in a larger tract was not *res judicata* in regard to another parcel, in the larger tract, not included in the previous case. In *McCombs v. Wall* we held that there was nothing, either in the record or in extrinsic evidence, to identify the land involved in the second case as having been in the original case, and thus *res judicata* was not established. The two cases relied on by the appellee are correct, but the law enunciated in those cases is not applicable to the case at bar because, here, there is extrinsic evidence that the tract now involved was also involved in the previous litigation.

Finally, (5) we mention *Rose v. Jacobs*, 231 Ark. 286, 329 S.W. 2d 179, wherein we quoted with approval from 50 C.J.S. 293, "Judgments" § 763:

> "Since the identity of parties is not a mere matter of form, but of substance, the rule of *res judicata* should not be defeated by minor differences of parties,

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(5) In addition to the cases heretofore cited, we have a number of other cases on *res judicata* which are germane to the points here discussed. Some such cases are: *Watson v. Suddoth*, 218 Ark. 960, 239 S.W. 2d 602, *certiorari* denied U.S. Supreme Court, 342 U.S. 885, 96 L.Ed. 664, 72 S. Ct. 174; *Langford v. Griffin*, 179 Ark. 574, 17 S.W. 2d 296; *Jones Lumber Co. v. Wisackana Lumber Co.*, 125 Ark. 65, 187 S.W. 1068; *Cleveland-McLeod v. McLeod*, 96 Ark. 405, 131 S.W. 405; *Sauls v. Shedrick*, 121 Ark. 594, 182 S.W. 269; *Gordon v. Clark*, 149 Ark. 173, 232 S.W. 19; *Lillie v. Nunnally*, 211 Ark. 202, 199 S.W. 2d 751; and *Barton v. Meeks*, 209 Ark. 963, 193 S.W. 2d 138.

Thus, where the issues in separate suits are the same, the fact that the parties are not precisely identical is not necessarily fatal to the conclusive effect of the prior judgment; and a substantial identify is sufficient. *** This rule, that there must be a substantial identity of parties as well as of the subject matter, is based on the fundamental principle that no man can be depriyed of his property except by due process of law, a principle which in the United States has been embodied in the Federal Constitution, and in the constitutions of the several states. *It has also been held that the true reason for holding an issue res judicata is not necessarily the identity or privity of the parties, but the policy of the law to end litigation by preventing a party who has had one fair trial of a question of fact from again drawing it into controversy, and that a plaintiff who deliberately selects his forum is bound by an adverse judgment therein in a second suit involving the same issues, even though defendant in the second suit was not a party, nor in privity with a party, in the first suit.*"

So we conclude that Hastings' plea of *res judicata* should be sustained; and it follows that the Chancery decree is reversed and the cause remanded, with directions to sustain Hastings' plea of *res judicata* and to dismiss the complaint of Rose Courts.

SUPREME COURT OF ARKANSAS

No. 5-3074

HARRY L. HASTINGS *et al.*, *Appellants*

v.

ROSE COURTS, INC., *Appellee*

Opinion Delivered December 23, 1963

Dissenting opinion.

GEORGE ROSE SMITH, ASSOCIATE JUSTICE

GEORGE ROSE SMITH, J., dissenting. Today's decision is demonstrably unjust, in that the Hastings Realty Company is acquiring a strip of land to which it has no title whatever. On the merits only five witnesses with engineering or surveying experience testified. All five of them fixed the disputed boundary line in accordance with the contentions of the appellee and the findings of the chancellor. Not one syllable of testimony to the contrary was offered by Hastings. That the strip actually lies within the tract described in the appellee's deed is, on the record before us, an undisputed fact.

Yet Hastings emerges as the owner of the land. This result comes about through an application of the doctrine of *res judicata*. Despite the majority's protracted discussion of elementary principles of law, as far as I can see the rule of *res judicata* actually has nothing at all to do with this case.

Two earlier chancery cases are involved. The first, No. 2474, cannot possibly be conclusive of the present litigation, and is not relied on by the majority. That case did

not concern the point now in controversy. There the only issue was the true location of the *southern* boundary of Lot 1. That issue had nothing to do with the true location of the *western* boundary of Lot 1, now in dispute. It happened that in Case No 82474 there was filed a surveyor's plat prepared with reference to the *southern* boundary, that erroneously located the *western* boundary in accordance with Hastings' present contention. But that error was wholly extraneous to the controversy then before the chancery court, did not lead to a binding decision fixing the *western* boundary line, and is not so interpreted by the majority in the case at bar.

After the decision in the first chancery case Arkansas Real Estate Company conveyed its interest in Lot 2 to the appellee, Rose Courts. Thereafter the second chancery case, No. 101718, was decided. That litigation did involve the boundary now in dispute; but the point is that the appellee, Rose Courts, was not a party to the case nor was it represented by a party. The plaintiff was Arkansas Real Estate Company, which had already conveyed Lot 2 to Rose Courts. Yet that is the decision that the majority hold to be *res judicata*.

Even after having studied the majority opinion I do not understand how it is that a grantee is bound by litigation brought by its grantor *after* the property has been conveyed to the grantee. This bewildering result seems to be reached solely because Traylor, the president of Rose Courts, happened to testify (inadvertently, as the majority seem to realize) that the land now in controversy is the same tract as that involved in the second chancery case.

Although this single statement in a record of several hundred pages is seized upon as the main support for today's decision, as far as I can see not even this statement justifies

the result that is being declared. If this scrap of Traylor's testimony is treated as a statement of fact—an assertion of the true location of the western boundary—then it is not only clearly inadvertent but also flatly contrary to, and overcome by, the wealth of engineering testimony that establishes the location of the boundary beyond question. On the other hand, if Traylor's statement is somehow looked upon as creating an estoppal against the corporation of which he is merely an officer, the short answer is that there can be no estoppel because there has been no reliance, no change of position, on the part of Hastings in consequence of this isolated bit of testimony.

I think the majority decision to be a serious miscarriage of justice.

Ward and Johnson, JJ., join in this dissent.

IN PULASKI CHANCERY COURT

OCTOBER TERM, 1948

Friday the 18th day of February, 1949

C. C. McCORD, *Plaintiff*

v.

No. 82474

ARKANSAS REAL ESTATE COMPANY, INC., *Defendant*

DECREE

On this day this cause came on regularly to be heard, and the plaintiff, C. C. McCord, appearing in person and by his solicitors, Buzbee, Harrison & Wright, and the defendant, Arkansas Real Estate Company, Inc., appearing by its solicitor, Wm. J. Kirby, and both parties announcing ready for trial, the cause was submitted to the court for its consideration and judgment upon the pleadings filed herein and the testimony of witnesses taken ore tenus before the bar of the court and the exhibits therto, from all of which, the court, being well and sufficiently advised in the premises, doth find:

That the defendant, Arkansas Real Estate Company, Inc., makes no claim to the East 156.3 feet of Lot 1 of the Rapley Estate in the Northwest Corner of Section 14, Township 1 North, Range 12 West, owned by plaintiff, and that its deed of July 23rd, 1946 from the First National Bank of Fort Smith, conveying, among other lots and parcels of land, Lot 1, and the North 5 acres of Lot 4 in the Subdivision of the East Fractional half of the NW¼ of Section 14, East of the Quapaw Line, in Township 1 North, Range 12 West,

is void insofar as it attempts to convey the said Lot 1 in the Subdivision of the East Fractional half of the NW¼ of Section 14, and should be set aside and cancelled as a cloud on plaintiff's title, otherwise said deed should remain in full force and effect.

That plaintiff has failed to establish adverse possession of that portion of the North 5 acres of Lot 4 in the Subdivision of the East Fractional half of the NW¼ of Section 14, East of the Quapaw Line, in Township 1 North, Range 12 West, belonging to defendant, and heretofore enclosed and claimed by plaintiff as his south boundary, that the true boundary line between the *properties involved* is as shown by Exhibit 8 herein, same being a plat of the survey made by C. T. Brandt December 11th, 1947, and that defendant was justified in removing plaintiff's fence from its property and placing same on the true boundary line as established by said survey.

It is, therefore, by the court considered, ordered, adjudged and decreed that the quitclaim deed from The First National Bank of Fort Smith to the defendant, dated July 23rd, 1946, and recorded in Record Book 334, page 45, be, and the same is hereby set aside and cancelled insofar as it attempts to convey Lot 1 in the Subdivision of the East Fractional half of the NW¼ of Section 14, East of the Quapaw Line, in Township 1 North, Range 12 West, otherwise said deed shall remain in full force and effect, and title to the East 156.3 feet of Lot 1 of the Rapley Estate in the Northwest Corner of Section 14, Township 1 North, Range 12 West is hereby quieted and confirmed in plaintiff free and clear of all claims of the defendant.

Title to the North 5 acres of Lot 4 in the Subdivision of the East Fractional half of the NW¼ of Section 14, East of the Quapaw Line, in Township 1 North, Range 12 West

is hereby quieted and confirmed in defendant free and clear of all claims of the plaintiff, and the boundary line as established by the Brandt survey, upon which defendant has placed the fence complaint of, is hereby fixed as the true boundary line between the properties.

It is the further order of this court that plaintiff take nothing by way of damages because of the removal of the fence from its property by defendant, and plaintiff shall pay the costs of this action.

IN PULASKI CHANCERY COURT.
CERTIFICATE

STATE OF ARKANSAS)
SS
COUNTY OF PULASKI.)

I, ARLINE TURNER, Clerk of the Pulaski County Chancery Court, do hereby certify that the foregoing is a true and correct copy of the Decree rendered on the 18th day of February, 1948, as the same appears of record in this office in Chancery Record Book No. 127, page 412, in the case of:

C. C. McCORD, *Plaintiff*

v.

No. 82474

ARKANSAS REAL ESTATE COMPANY, INC., *Defendant*

IN WITNESS WHEREOF, I hereunto subscribe my name and affix the seal of said Court, at my office in the City of Little Rock, Arkansas, this 10th day of October, 1957.

ARLINE TURNER, *Chancery Clerk*
By /s/ JAMYE DREHER, D.C.

IN THE CHANCERY COURT OF PULASKI COUNTY, ARKANSAS

ARKANSAS REAL ESTATE CO., INC., *Plaintiff*

v.

No. 101718

C. C. McCORD and ANISE McCORD, *Defendants*

DECREE

On this day this cause comes on to be heard, the parties appearing by their attorneys, agreeing that this cause could be presented on the Complaint of the plaintiff, the Answer of the defendants and other evidence before the Court, from all of which the Court doth find:

That the Complaint of the plaintiff should be denied for the reason that the issues set forth in the Complaint of the plaintiff were fully determined in Case No. 82474, styled C. C. McCord v. Arkansas Real Estate Company, Inc. and that, therefore, this matter is res adjudicata and judgment should be entered for the defendants.

It is, therefore, considered, ordered, adjudged and decreed that the Complaint of the plaintiff be and it hereby is dismissed because all of the issues contained in the Complaint of the plaintiff were fully adjudicated in the prior case in the Chancery Court of Pulaski County, Arkansas, numbered 82474, styled C. C. McCord v. Arkansas Real Estate Company, Inc.

DATED: JULY 28, 1955

Recorded in Second Division Chancery Record Book No. 93, page 237.

In Pulaski Chancery Court

Certificate

State of Arkansas)
SS
County of Pulaski.)

I, ARLINE TURNER, Clerk of the Pulaski County Chancery Court, do hereby certify that the foregoing is a true and correct copy of the Transcript of all the pleadings filed in this office filed on the dates shown thereon as the original appear on file in this office and of the Decree rendered on the 28th day of July, 1955, as the same appears of record in this office in Second Division Chancery Record Book No. 93, page 237, in the case of:

Arkansas Real Estate Co., Inc., *Plaintiff*

v.

No. 101718

C. C. McCord and Anise McCord, *Defendant*

IN WITNESS WHEREOF, I hereunto subscribe my name and affix the seal of said Court, at my office in the City of Little Rock, Arkansas, this 8th day of October, 1957.

Arline Turner, *Chancery Clerk*
By /s/ Jamye Dreher, D.C.